in *Blair* v. *Birkenstock*, 271 U.S. 348, that an overpayment of a tax payable in installments occurred at the time the total payments exceeded the correct tax, even though some installments remained unpaid.

4. In repeatedly urging that the decision below reflects settled law, the Government has lightly brushed aside long-standing decisions squarely upholding jurisdiction.

The Government has misstated the case authority dealing with suits to recover payments made in partial satisfaction of asserted tax liabilities. It states that *Bushmiaer* v. *United States*, 230 F.2d 146 (8th Cir.), is "the only decision in point which lends any support to the taxpayer's argument . . ." (Br. 21). Then it attempts by footnote to distinguish appellate decisions which, even before the *Bushmiaer* case, had generally been accepted as correctly establishing the right to bring such suits (Br. 22, n.7).

In 1940 the Court of Appeals for the Second Circuit rejected the Government's argument that a suit to recover two installment payments could not be instituted prior to payment of the remaining installments.[9] *Coates* v. *United States*, 111 F.2d 609 (2d Cir.). The Government would distinguish that case on the ground that collection of the balance of the tax was enforced while the suit was pending. That the court did not rely on any such distinction is shown by the language of the opinion quoted in taxpayer's original brief (Br. 7).

This decision was followed in 1941 by *Sirian Lamp Co.* v. *Manning*, 123 F.2d 776 (3d Cir.), where the court rejected

[9] Two earlier cases recognizing jurisdiction in a suit for refund despite the contemporaneous assertion of a deficiency, *Emery* v. *United States*, 27 F.2d 992 (W.D. Pa.); *Old Colony R.R.* v. *United States*, 27 F.2d 994 (D. Mass.), were cited with approval in *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 728. See also *Thomas* v. *United States*, 18 F. Supp. 942 (Ct. Cl.), where the Government in 1937 apparently did not even raise the issue.

the argument that a suit to recover a payment in partial satisfaction of an asserted deficiency could not be instituted prior to payment of the entire deficiency. The Government seeks to distinguish that case because it involved a suit against the Collector instead of the United States. There, however, the court refused to read jurisdictional restrictions into language *identical* with that involved in this case. Rev. Stat. § 3226 (1875) (now Int. Rev. Code of 1954, §§ 6532(a)(1), 7422(a)).

The treatises and other published comments on the *Coates* and *Sirian Lamp* cases show that, even before the *Bushmiaer* decision, they were accepted as reflecting settled law on the issue. For example, the 1948 edition of Mertens, *Federal Income Taxation*, Vol. 10 § 58.47 n.67, states:

> "It is, of course, axiomatic that a tax must have been paid, either directly . . . or indirectly in order to be the subject of a suit for recovery of the tax. It is now settled that the taxpayer need not make full payment of the entire tax shown on the return in order to maintain a suit for refund [citing the *Coates* and *Sirian Lamp Co.* cases]. . . ."

The same treatise approved the *Sirian Lamp Co.* case in the following terms (Id. § 58.34):

> "[T]he Circuit Court properly [overcame] . . . the reasoning of the lower court that failure to require full payment might interfere with collection of the revenue, by stating that a taxpayer's suit for the recovery of a portion of the tax would not necessarily prevent the Commissioner's collection of the remainder, while it is pending." [10]

[10] See other comment to the same effect in: 3 Rabkin and Johnson, *Federal Income, Gift and Estate Taxation* § 72.04(6); 3 Casey, *Federal Tax Practice* § 11.5 (1955); Brodsky, *Tax Refunds and How to Obtain*

Recent district court decisions have also allowed such suits. *Hanchett* v. *Shaughnessy*, 126 F. Supp. 769 (N.D. N.Y.), allowed such a suit, although the asserted income tax deficiency had not been paid in full. *Jones* v. *Fox*, 57-2 U.S.T.C. ¶ 9876 (D. Md.) and *Midhudson Systems, Inc.* v. *United States*, 56-2 U.S.T.C. ¶ 9687 (S.D.N.Y.), allowed suits to recover payments of excise taxes although the entire assessments had not been paid, relying on the precedents in the income tax field. See also *McFarland* v. *United States*, 57-2 U.S.T.C. ¶ 9733 (M.D. Tenn.); *cf. Friebele* v. *United States*, 20 F. Supp. 492 (D.N.J.). In contrast, the decision below has been followed in only one case. *Rogers* v. *United States*, 155 F. Supp. 409 (E.D.N.Y.).

The Government cites *Suhr* v. *United States*, 18 F. 2d 81, 83 (3d Cir.); *Bendheim* v. *Commissioner*, 214 F. 2d 26, 28 (2d Cir.) and *McConkey* v. *Commissioner*, 199 F. 2d 892, 895 (4th Cir.), cert. denied, 345 U.S. 942. These cases are in no way pertinent to the issues of the present case. In the *Sirian Lamp Co.* case, *supra*, the Court of Appeals for the Third Circuit reversed a lower court which had erroneously relied on its decision in the *Suhr* case. The *Bendheim* case, like the *McConkey* case, dealt only with the right of appeal to the Tax Court. The *Coates* decision was not "repudiated" by the later decision of the same court in the *Bendheim* case or even cited in the opinion. Furthermore, the Government's failure to petition for certiorari in the *Coates* and *Sirian Lamp Co.* cases, and, even more significantly, in the *Bushmiaer* case, shows its acknowledg-

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Them 13-14 (Prentice-Hall 1955); Brodsky, *Suits for Refund*, 11th Annual N.Y.U. Institute on Federal Taxation 751-52 (1952); Brown, *Refund Suits Against Collectors*, 28 Taxes 937 (1950); Annot., 138 A.L.R. 1423 (1941); 54 Harv. L. Rev. 1404 (1941). Thus the only possible support reflected in the Government's brief for its statement regarding "the Treasury's long-standing interpretation and practice" (Br. 8) is that long ago two courts of appeals held the interpretation was wrong.

ment that there was no conflict on the issue prior to the decision below.[11]

5. The Government misinterprets the significance of Section 7422(e) of the 1954 Code.

The Government complains of the possibility of a multiplicity of suits which it undertakes to support with the following statement (Br. 20):

> "Under taxpayer's view of the statutory scheme for litigating deficiency determinations, a taxpayer against whom the Commissioner has asserted a deficiency might elect to contest its validity in the District Court by way of a refund suit based upon payment of only a part of the deficiency, and simultaneously contest its validity in the Tax Court by timely filing a petition for redetermination with respect to the balance."

The Government's reasoning is not clear and the foregoing statement is completely without foundation. Section 7422(e) of the Internal Revenue Code of 1954,[12] mentioned by the Government, covers squarely this question of dual jurisdiction.

Prior to the 1954 Code a taxpayer who filed suit for refund in a district court or the Court of Claims and thereafter received a statutory notice of deficiency for the same taxable year could file a petition for review in the Tax Court and thus give jurisdiction to two courts concurrently. *Ohio Steel Foundry Co.* v. *United States*, 38 F.2d 144 (Ct. Cl.); *Camp* v. *United States*, 44 F.2d 126 (4th Cir.). Congress enacted Section 7422(e) for the express purpose of

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[11] It is noteworthy that Congress in making substantial amendments in 1954 to the provisions of 28 U.S.C. § 1346(*a*) and the Internal Revenue Code did not see fit to change the accepted rule of the *Coates* and *Sirian Lamp Co.* cases. It is also significant that the Treasury did not seek any change in this rule.

[12] Set forth in the Appendix, *infra*.

confining jurisdiction under such circumstances to a single court, allowing the taxpayer to choose between the two.[13]

Throughout its brief the Government argues that a decision in the present case requires adjudication in the district court of the Commissioner's claim for additional taxes and that this is contrary to Congressional policy. Certainly on the merits the district court below had before it the single issue of whether petitioner was entitled to the questioned deduction and had thus overpaid his taxes, or was not entitled to the deduction and thus owed the additional taxes set out in the counterclaim. The argument that the consideration of such a case conflicts with Congressional policy is inconsistent with the Congressional recognition in Section 7422(e) that a taxpayer does have a right to maintain a suit for refund in the district court where an asserted deficiency for the same taxable year remains unpaid. Section 7422(e) neither created nor denied the right. It merely provided that the taxpayer could not exercise the right and at the same time maintain a case in the Tax Court.

The Government has, therefore, missed completely the real significance of Section 7422(e) in the present case. It is attempting to attribute to Congress an intent to deny a result which Congress expressly recognized by enacting Section 7422(e). The enactment of the Section supports taxpayer's position that the plain words of the statute be given their plain meaning and that jurdisdiction in the present case be upheld.

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[13] S. Rep. No. 1622, 83d Cong., 2d Sess. 610-11 (1954).

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed and the cause should be remanded to that Court with instructions to consider the appeal from the United States District Court upon the merits.

Respectfully submitted,

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April, 1958.

APPENDIX

Internal Revenue Code of 1954:

Sec. 6511. *Limitations on credit or refund.*

(a) *Period of limitation on filing claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) *Limitation on allowance of credits and refunds.*—

(1) *Filing of claim within prescribed period.*—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) *Limit on amount of credit or refund.*—

(A) *Limit to amount paid within 3 years.*—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) *Limit to amount paid within 2 years.*—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the

the taxpayer files a petition for redetermination of its correctness. Int. Rev. Code of 1954, § 6213. The Government's argument is based on the erroneous assumption that maintenance of a suit for refund of an amount paid in partial satisfaction of an assessed deficiency has the same effect as a petition to the Tax Court in restraining the assessment and collection of taxes.

The same erroneous assumption underlies the Government's arguments that the maintenance of this suit circumvents both the prohibition against suits to enjoin collection of taxes and the provision expressly excepting tax cases from the operation of the Federal Declaratory Judgments Act (Br. 17-19). This erroneous assumption is also present in the language quoted from the dissenting opinion in *Bushmiaer* v. *United States*, 230 F.2d 146 (8th Cir.) (Br. 21-22).

It should be perfectly clear that a suit to recover a payment made on an assessment does not relieve the taxpayer from his obligation to pay the balance of the assessment nor restrain the Director from proceeding to collect the balance. Nowhere in the record is there any indication taxpayer asked the District Court for such restraint. Section 7421 of the Internal Revenue Code of 1954 would clearly prohibit it.

The Government could not argue forthrightly that the bringing of this suit in any way restrained collection. It perhaps tacitly admits the contrary with the curious comment that "the Government was under no duty after commencement of the suit to remove the jurisdictional defect . . . by collecting the balance of the assessment (Br. 6; see also Br. 23). This begs the question by assuming that there is a jurisdictional defect. Moreover, the Director of Internal Revenue does have a duty to demand and collect. Int. Rev. Code of 1954, §§ 6301, 6303(a). Although the Government continues throughout its brief to insinuate that the

bringing of this suit somehow enabled the taxpayer arbitrarily to ignore the claim of the Director for the balance of the tax, absolutely no authority is cited to explain how this suit in any way affected the broad powers of collection set out in Chapter 64 of the Internal Revenue Code of 1954 or the criminal penalties for punishment of anyone who attempts to thwart collection.[7]

The Government's extensive reliance upon bald statements that the payment for which suit was brought was a "token" payment and that taxpayer "chose" to withhold the balance while suing to recover the payment evades acknowledgment of the real reason why the entire assessment was not collected (Br. 5, 6, 7, 8, 12, 13, 14, 19, 23). Where a taxpayer has paid all that he can, it is impertinent for the Government to refer to it as a "token." In the present case an assessment was made against taxpayer in the amount of $28,908.60, and payments were thereafter made totaling $5,058.54 (R. 11). Failure to collect the entire assessment during the twenty-eight month period between assessment and suit (R. 1, 5) can be attributed only to taxpayer's inability to pay.

Thus, the failure of the Commissioner to collect more from taxpayer could be due only to the old principle that it is impossible to get blood out of a turnip. Any gross disproportion between the amount that the taxpayer is able to pay and the total amount of an assessment merely emphasizes the futility of telling him that he has a right to sue, but must wait until he has completed his payments.

3. The Government has drawn unwarranted inferences from general statements by this Court which do not allude even remotely to the issue here.

The Government argues that a requirement of payment of "the entire deficiency" prior to a suit for refund of

[7] Int. Rev. Code of 1954, §§ 7201, 7206, 7212.

portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) *Limit if no claim filed.*—If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * * * *

Sec. 6532. *Periods of limitation on suits.*

(a) *Suits by taxpayers for refund.*—

(1) *General rule.*—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

* * * * * * *

Sec. 7422. *Civil actions for refund.*

(a) *No suit prior to filing claim for refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * * * *

(e) *Stay of proceedings.*—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer

in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

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No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1957

WALTER W. FLORA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 14–18) is not yet officially reported. The opinion of the District Court (R. 12–18) is reported at 142 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1957. The petition for a writ of certiorari was filed on September 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the United States District Court has jurisdiction of a tax refund suit when the taxpayer